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No. 94-1685

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

KERR-MCGEE COAL CORPORATION,
a Delaware corporation,
Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION; ROBERT REICH, as Secretary of Labor, United States Department of Labor; MINE SAFETY AND HEALTH ADMINISTRATION of the United States Department of Labor; and INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICI CURIAE* NATIONAL MINING ASSOCIATION, *ET AL.*, IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

The Federal Mine Safety and Health Act of 1977 requires the Secretary of Labor to inspect the Nation's mines and allows "a representative" of miners to accompany the Secretary on his inspection. In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), this Court explained that statutes should not be construed in a manner that infringes basic property rights unless such a construction is necessary to fulfill the purposes of the statute.

The question presented is whether the Secretary's interpretation of the Mine Act to permit non-employee union organizers to be named miners' representatives at a non-union mine in contravention of the mine operator's common-law right to exclude such persons from his property is a reasonable interpretation of the Act.

AMICI CURIAE

The *amici curiae* are the National Mining Association, Wyoming Mining Association, Utah Mining Association, Alabama Coal Association, Coal Operators and Associates of Kentucky, Illinois Coal Association, Virginia Coal Association and West Virginia Mining and Reclamation Association.

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The National Mining Association, Wyoming Mining Association, Utah Mining Association, Alabama Coal Association, Coal Operators and Associates of Kentucky, Illinois Coal Association, Virginia Coal Association and West Virginia Mining and Reclamation Association, as

amici curiae [1] file this brief in support of a petition for a writ of certiorari filed by Kerr-McGee Coal Corporation ("Kerr-McGee"), and respectfully request that the Court grant the petition.

INTERESTS OF THE *AMICI CURIAE*

The eight *Amici* represented here constitute a cross-section of national and state trade associations whose members are engaged in the minerals extractive industries.

The National Mining Association ("NMA") is a recently formed national trade association joining the National Coal Association ("NCA") and the American Mining Congress ("AMC"), each of whom participated as *amici curiae* in this litigation before the United States Court of Appeals for the District of Columbia Circuit and before the Federal Mine Safety and Health Review Commission. Members of the NMA include a substantial percentage of the nation's mining companies. Those members produce most of the nation's coal, metals and industrial and agricultural minerals. Additionally, NMA members include manufacturers of mining and mineral processing machinery, equipment and supplies, engineering and consulting firms, and financial institutions that serve the mining industry.

The Wyoming Mining Association and Utah Mining Association are each a mining industry state trade association whose membership includes most of the mining companies operating in their respective states.

The Alabama Coal Association, Coal Operators and Associates of Kentucky, Illinois Coal Association, Virginia Coal Association and West Virginia Mining and Reclamation Association are each a state trade association whose membership includes coal mining companies

[1] This brief of *amici curiae* is being filed with the consent of the parties, whose written statements of consent have been filed with the Clerk of the Court.

of all sizes, as well as coal brokers, coal transporters and coal resource owners and developers.

The central purpose of each *amici* is to represent the interests of its members in a wide range of public policy issues affecting the development, mining, and use of our nation's coal and mineral resources. This includes a regular participation in legislative, administrative and judicial proceedings in behalf of the mining industry on matters regarding mine safety and health, employer-employee relations, and other issues impacting the mining industry.

STATEMENT OF THE CASE

Amici curiae adopt Kerr-McGee's statement of the case. They would underscore that the issues raised in Kerr-McGee's petition impact both non-union mines such as Kerr-McGee's Jacob's Ranch Mine and *amici curiae's* members' unionized mines. Indeed, the Secretary of Labor's ("the Secretary") interpretation of the Federal Mine Safety and Health Act of 1977 ("Mine Act") dramatically impacts *amici curiae's* unionized members. Under the Secretary's interpretation, competing unions seeking to oust incumbent collective bargaining representatives at a union mine could be designated as representatives of miners under Section 103(f), 30 U.S.C. § 813(f). Such a result not only improperly restricts the private property interests of the *amici curiae's* members but also unnecessarily injects conflict, if not havoc, in the labor relations of the Nation's union mines.

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE D.C. CIRCUIT AND THE COMMISSION BEFORE IT ARE IN DIRECT CONFLICT WITH THE CONSISTENT HOLDINGS OF THIS COURT THAT, IN DETERMINING WHETHER A PARTICULAR ADMINISTRATIVE ACTION IS APPROPRIATE, AN EMPLOYER'S PRIVATE PROPERTY INTERESTS CANNOT BE ABROGATED BY CLAIMED GOVERNMENTAL STATUTORY/REGULATORY INTERESTS WITHOUT FIRST EVALUATING AND BALANCING THE COMPETING PRIVATE AND GOVERNMENTAL INTERESTS.

Governmental regulation at the federal, state and local levels regularly impacts the private interests of individuals and businesses. As detailed in Kerr-McGee's petition, this Court has consistently held, however, that where such governmental regulations restrict or eliminate interests such as those in private property, a close evaluation must be made of the asserted governmental interests in regulation as against the private interests being abrogated. Neither the Commission nor the D.C. Circuit made such a review here.

Amici curiae endorse, and incorporate, the points made in Kerr-McGee's petition in this regard. The Secretary's interpretation of the Mine Act ignores the property rights of mine operators and erroneously fails to evaluate and balance those interests with Mine Act enforcement needs.

Governmental agencies cannot limit private property interests merely because some regulator concludes the narrow interests of a single statute might be served. This is especially true here where the asserted interests of the Secretary not only conflict with the private property interests of Kerr-McGee, but also are at odds with the consistent decisions of this Court under federal labor law upholding broad limitations on non-employee union organizer access to company property. *See, Lechmere v.*

NLRB, 502 U.S. 527 (1992). Likewise, the consistent governmental policy of neutrality towards company-union matters cannot be overlooked.[2]

This Court has never limited its analysis of private property interests with competing governmental interests to whether the regulators' statutory/regulatory construction is reasonable within the confines of the regulatory scheme in issue. *E.g.*, *Lechmere, Inc. v. NLRB*, *supra*; *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994); and *Donovan v. Dewey*, 452 U.S. 594 (1981). The decisions below that suggest such a restrictive view is proper should not be allowed to stand.

The D.C. Circuit and Commission decisions each ignore and conflict with the decisions of this Court mandating that governmental regulatory activity which limits or eliminates private property rights can only be undertaken after the asserted governmental interests are evaluated against and balanced with those private property interests. Neither the Commission nor the D.C. Circuit undertook that evaluation. This Court should grant certiorari and reject the notion that the Mine Act has a different status from other federal regulation.

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[2] Indeed, the same 95th Congress which passed the Mine Act had before it major labor law reform legislation. That legislation, among other things, had a so-called "equal access" provision which would have given unions an opportunity to address employees during working time where an employer had done so. Additionally, the proposed legislation provided that "[i]f the employer engaged in a 'concerted campaign' against the union, but did not halt production [to give a speech to workers], organizers would be allowed to enter non-working areas such as the lunchroom or parking lot." *Congressional Quarterly Alamanac*, 95 Congress 2d Sess. 1978, Vol. XXXIV, p. 285. The very Congress which passed the Mine Act specifically rejected the notion of giving union organizers access to company property. To urge, as the Secretary does here, that Congress impliedly did that in the Mine Act is simply wrong.

II. THE DECISION OF THE D.C. CIRCUIT RAISES AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW REGARDING THE FRAMEWORK FOR ANALYZING AND BALANCING COMPETING PRIVATE PROPERTY INTERESTS WITH ASSERTED INTERESTS OF GOVERNMENT REGULATORS.

The decisions below raise important and recurring questions of federal law—when and how must competing private property interests be balanced against asserted governmental regulatory interests. This Court in numerous cases has directed that an evaluation and balancing of these interests be undertaken. Merely determining that the asserted governmental interests are consistent with the narrow dictates of some statutory or regulatory objective has never before been sufficient to abrogate either an individual or a company's private property interests. *Lechmere, Dolan, Donovan,* and the many cases preceding them highlight the necessity for careful review and evaluation of competing private and governmental interests.

Indeed, the D.C. Circuit, in analyzing conflicts between two statutory schemes, describes well what should have been done here. In *New York Shipping Ass'n v. Federal Maritime Comm'n*, 854 F.2d 1338 (D.C. Cir. 1988), the D.C. Circuit, relying extensively upon precedent in this Court, noted that "[f]requently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand for an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." *Id.* at 1365 (citations omitted). In such a circumstance of conflicting interest, the administrative agency "must adequately explain not only why its interpretation is consistent with the shipping [mining] laws, but also why it accomplishes the accommodation [with private property interests] required (or, alternatively, why no accommodation is possible), and why any alternative,

more accommodating interpretations were rejected. In order to do this, the Commission must identify the relevant labor policies [property interests] that are to be accommodated, a task quite clearly beyond the Commission's claim of expertise and outside *Chevron's* rationale for deferential review." *Id.* The D.C. Circuit went on to hold that "no special deference" should be given to an administrative agency's decision under those circumstances. After detailed discussion and analysis of the interests, the D.C. Circuit upheld the Federal Maritime Commission's decision. The clear teaching is that competing interests must be balanced and cannot be resolved in the vacuum of the regulator's statute.

This issue has particular import for the mining industry. The Secretary has consistently taken the position that any two employees can designate anyone to be their representative under Section 103(f), 30 U.S.C. § 813(f), and 30 C.F.R. Part 40. The Secretary has made clear throughout this litigation that even at union mines two or more employees can designate a competing union as their representative to participate in inspections. Indeed, as pointed out before the D.C. Circuit, the Secretary takes the position that "a competitor would be a proper miners' representative, as would 'Whistler's Mother' and President Bush, despite the fact that they have no mine safety and health expertise." Brief of *Amici Curiae* American Mining Congress, National Coal Association and Wyoming Mining Association at 10, n.8.

The impact of the D.C. Circuit's erroneous conclusion that a labor union can be the "representative" of miners in a non-union mine is exacerbated by its uncritical acceptance of the Secretary's view that any representative, regardless of objectives, can be appointed by as few as two miners at a particular mine. A "representative of miners" is defined as "[a]ny person or organization which represents two or more miners at a coal or other mine for purposes of the Act." 40 C.F.R. § 40.1(b)(1). The

court of appeals agreed that "an 'organization' that represents less than 50% of the miners may act as a miners' representative under the Secretary's regulations." 40 F.3d at 1262. A central unaddressed issue is when does an organization "represent" two or more miners.

The D.C. Circuit, and Commission before it, refused to interpret "represents" to mandate a showing of some recognized representational status for the person or organization as a prerequisite to appointment as a "representative of miners." Under the approach argued by Kerr-McGee, a union duly certified to represent all or some portion of a mine operator's employees could be designated under Section 103(f). A union with no status, other than a desire to unionize the mine's employees, could not. Failure to follow this approach allows any two miners to appoint anyone, regardless of expertise, and even though the appointed may have objectives other than health and safety.

This case also has major importance because of the practical impact of the decisions below on federal labor law.[3] A benchmark of the federal labor laws has been to maintain governmental neutrality in labor-management relations and to interfere in that relationship only to remedy unlawful conduct. By contrast, here, MSHA is interpreting Section 103(f) to give non-employee union organizers a role in Kerr-McGee's operations which goes beyond even the rights of a duly certified collective bargaining representative. The practical import of decisions such as *Lechmere* in allowing employers to keep non-employee union organizers out should not be subject to

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[3] This Court has before it now a case addressing the question of a union employee/organizer's status when he/she applies for employment at a company the union is seeking to unionize. *NLRB v. Town & Country Elec., Inc.*, No. 94-947, *cert. granted*, 63 U.S.L.W. 3556 (Jan. 24, 1995), *opinion below* 34 F.3d 625 (8th Cir. 1994). Issues of when and how union organizers may gain access to company property continue to draw major attention for all non-union employers.

the fortuity of whether the employer happens to be a mine operator.[4]

The effect of this federal government endorsement of union organizers can also be critical to the union election process. Decisions have invalidated union elections because of the endorsement of a union by a state official. *Columbia Tanning Corp.*, 238 NLRB 899, 900 (1978) (election set aside where state labor commissioner sent letter endorsing union). *See also LeBoe Tire & Rubber Co.*, 208 NLRB 84, 90-91 (1974) (upholding election objections where employer allowed union special use of company property).[5]

The issues here thus have broad implications for all mining employers in the context of their employee relations. Likewise, in departing from the traditional framework of balancing competing property interests with asserted regulatory interests, the issues here impact all areas where governmental regulations are at odds with their private property interests.

Finally, the Constitutional underpinnings of the issues here cannot be ignored. These were highlighted by Circuit Judge Sentelle in his concurrence. 40 F.3d at 1266. Kerr-McGee has not made a broad constitutional challenge to 30 U.S.C. § 813(f). Kerr-McGee has noted that its property rights are protected by the Fifth Amendment and has urged against that backdrop that those rights

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[4] This is further underscored since what constitutes a "mine" has itself been the subject of considerable dispute. *See, e.g., Pennsylvania Elec. Co. v. FMSHRC*, 969 F.2d 1501 (3d Cir. 1992); *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547 (D.C. Cir. 1984).

[5] An employer which recognizes and deals exclusively with a union which does not represent a majority of its employees commits an unfair labor practice. *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961). While not strictly applicable, the Court's discussion of the importance of maintaining individual employee rights in that context is instructive here. *See, id.* at 737-739.

cannot be abrogated, consistent with a long line of decisions of this Court, without there first being a rigorous analysis and evaluation of its rights as against the asserted interests of MSHA in having non-employee union organizers (1) accompany MSHA inspectors at its mine, (2) examine its private records (either with an inspector, or without, in the case of employee training records, 30 C F.R. §§ 48.9, 48.29), and (3) participate as a party in litigation between Kerr-McGee and the Secretary. *See* 29 C.F.R. § 2700.4 and 30 C.F.R. § 44.3. This Court's approach has consistently been to balance private property interests with asserted regulatory interests, presumably as a part of the long accepted approach of construing statutes so as to avoid squarely confronting a Constitutional issue. The cases have consistently balanced asserted statutory interests with the private property interests of a company, regardless of the seeming clarity of the statutory provision, or its interpretation by an administrative agency.

The departure from that approach by the Commission and the D.C. Circuit has grave implications not only for mining and other employers, but also for all who are subject to governmental regulation. These issues are important and recurring. Certiorari should be granted both to reject this departure from the accepted framework of balancing of competing interests and review of administrative action and to insure that Constitutionally protected interests and private property are preserved.

CONCLUSION

Amici curiae support the Petition for a Writ of Certiorari by Petitioner Kerr-McGee, and respectfully pray that the Court grant a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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